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In The

Supreme Court of the United States

October Term, 1995

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

v.

STEPHEN B. MACFARLANE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF ARIZONA, CONNECTICUT, HAWAII, IDAHO, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WISCONSIN AND NEW MEXICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

TOM UDALL
New Mexico Attorney General
FRANK D. KATZ
(Counsel of Record)
DONALD F. HARRIS
Special Asst. Attorneys General
Taxation and Revenue Department
P.O. Box 630
Santa Fe, NM 87509-0630
505-827-0731

27 pp

No. 96-235

LISTING OF PARTICIPATING STATES' ATTORNEYS GENERAL OTHER THAN NEW MEXICO

GRANT WOODS
Attorney General
State of Arizona

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

THOMAS J. MILLER
Attorney General
State of Iowa

SCOTT HARSHBARGER
Attorney General
Commonwealth of Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

JEFFREY R. HOWARD
Attorney General
State of New Hampshire

DENNIS C. VACCO
Attorney General
State of New York

MICHAEL F. EASLEY
Attorney General
State of North Carolina

HEIDI HEITKAMP
Attorney General
State of North Dakota

BETTY D. MONTGOMERY
Attorney General
State of Ohio

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

THEODORE R. KULONGOSKI
Attorney General
State of Oregon

MARK BARNETT
Attorney General
State of South Dakota

DAN MORALES
Attorney General
State of Texas

JAN GRAHAM
Attorney General
State of Utah

JEFFREY L. AMESTOY
Attorney General
State of Vermont

JAMES S. GILMORE, III
Attorney General
State of Virginia

JAMES E. DOYLE
Attorney General
State of Wisconsin

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW MEXICO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The *amici curiae* states, through their undersigned attorneys general, respectfully submit this brief in support of the Franchise Tax Board of the State of California's petition for certiorari.

INTEREST OF *AMICI CURIAE*

One of the primary law enforcement responsibilities of state government is ensuring that citizens comply with state tax laws. The *amici* states have a vital interest in this case because the decision below significantly, unfairly and erroneously hampers the enforcement of those laws.

At issue is whether a taxpayer who has the burden of proof under state law can switch the burden to the government by filing for bankruptcy. This is not a rare or unusual situation. The Administrative Office of the United States Courts is projecting over one million bankruptcy petition filings in the United States in 1996 for the first time ever. An enormous amount of tax revenues are affected by the bankruptcy courts.

On several occasions, this Court has noted that burden of proof is an issue of substantive law. It will often determine the prevailing party in a legal proceeding. In the tax context, especially where the sales revenue or income is established and the issue involves a deduction or exemption, the rule of requiring the taxpayer to bear the burden of proof is essential and promotes the policies of tax administration. The alternative of requiring the government to disprove a claimed deduction of the taxpayer would not only be impractical, it would seriously undermine the companion laws requiring taxpayers to keep adequate documentation. Moreover, the gross disadvantage of the government as to knowledge of the particulars of the taxpayer's financial affairs makes placing the burden of proof on the taxpayer necessary and eminently fair.

SUMMARY OF ARGUMENT

1. The court below determined that in a bankruptcy proceeding the taxing authority has the ultimate burden of proving its claim. The court acknowledged that "the bankruptcy code is silent" on this issue and that its decision was based solely upon "policy considerations." The Ninth Circuit's refusal to apply the state law burden of proof violates both federal statutory and common law and conflicts with this Court's decisions. *See* 28 U.S.C. § 1652 (state law provides the "rules of decision in civil actions" in which state law is decided in federal court); *Butner v. United States*, 440 U.S. 48 (1979)

(Unless Congress specifically states otherwise, the basic rule in bankruptcy is that state law determines the substantive rights of the parties). Moreover, the decision below directly contravenes congressional intent—the decision treats governmental tax claims less favorably than other claims, even though Congress grants priority to tax claims.

2. The opinion of the court below would seriously disrupt the administration of tax laws by placing on governmental entities an unfair burden that does not exist outside bankruptcy courts. Because the burden of proof is more beneficial to taxpayers in the Ninth Circuit's bankruptcy courts than in state court on tax matters, the bankruptcy courts in that circuit will often reach a different conclusion than the state courts on the ultimate issue of liability. Such result is directly contrary to the doctrine of comity and federalism with regard to state law determinations in federal courts. *See Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938). Since the bankruptcy forum has been rendered more favorable for taxpayers in some circuits than the non-bankruptcy forum, the case below will engender forum shopping, funneling people with tax problems into the bankruptcy courts, and the potential for significant loss of government revenues.

ARGUMENT

Mr. Macfarlane filed bankruptcy in 1990. The bankruptcy court denied claims for income tax for years 1988 and 1989, which claims are both entitled to priority under Code § 507(a)(8)(A)(i) and are non-dischargeable under Code § 523(a)(1)(A). Although the Court below discussed balancing the equities between the Board and the other creditors, 83 F.3d at 1045, the dispute was solely between the State of California and Mr. Macfarlane who is the principal beneficiary of the court's ruling.

The basis of the litigation was whether Mr. Macfarlane's bad debt deduction should be disallowed. The expenditures which gave rise to the "debt" were millions of dollars of withdrawals from Mr. MacFarlane's account made pursuant to blanket powers of attorney by his accountant, Mr. Cheng. The California Franchise Tax Board had reason to suspect that the advances did not constitute bona fide debts, notwithstanding the existence of promissory notes. *See In re Uneco, Inc.*, 532 F.2d 1204 (8th Cir. 1976) (after first ruling that the trustee had the burden of proving a bad debt deduction in bankruptcy, the court noted that there was no bona fide debtor/creditor relationship notwithstanding that the advances were carried on the debtor's books as accounts receivable); *Republic Steel Corp. v. U.S.*, 159 F.Supp. 366 (Ct. Cl. 1958) (promissory notes "floating around" on books were not enough to establish bona fide debt). Alternatively, even if the "debt" was bona fide, it might not have become a bad debt until after Mr. Macfarlane's bankruptcy and thus not deductible in the pre-bankruptcy tax years,[1] which would cause any deduction to be properly taken only with regard to a tax year or tax liability that is not subject to the bankruptcy court's jurisdiction. Mr. Cheng filed bankruptcy the year following Mr. Macfarlane's bankruptcy filing. By filing bankruptcy, Mr. Cheng probably avoided any taxable income which would have otherwise arisen from the write-off of his alleged indebtedness. 26 U.S.C. § 108(a)(1)(A). Both Mr. Macfarlane and Mr. Cheng may be able to avoid any tax liability relating to the depleted monies. The factual context raises suspicions.

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[1] A nonbusiness bad debt is treated as a short-term capital loss, 26 U.S.C. §166(d), which, for an individual, can only be carried forward, not backward. 26 U.S.C. § 1212(b).

The purpose of the court's opinion was to address "which party has the ultimate burden of proof in bankruptcy proceedings when a state files a claim for taxes alleging that a debtor's bad debt deductions are invalid." 83 F.3d at 1042.

The Bankruptcy Code provides no "rules of decision" for how claims should be determined. In the most general terms possible, Congress has stated only that, "if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency . . . ." Code § 502(b). Similarly, Code § 505(a)(1) permits the court to "determine the amount or legality of any tax . . . ." As the court below recognized, "[t]he bankruptcy code is silent on the allocation of the ultimate burden of proof in [tax cases]." Bankruptcy courts are units of the United States district courts. 28 U.S.C. § 151. The Rules of Evidence apply in the bankruptcy courts. Federal Rule of Evidence 101.

Under 28 U.S.C. § 1652, the state law provides the rules of decision in cases where state law is to be determined in federal court. As a general, and well recognized, matter of tax law the ultimate burden of persuasion is placed on the taxpayer. *See Stohr. v. New Mexico Bureau of Revenue*, 90 N.M. 43, 559 P.2d 420 (Ct. App. 1976).[2] Although the tax at issue in the

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[2] *See also, e.g.*, N.C. Gen Stat. § 105-164.26 (presumed that all receipts of wholesalers and retailers are subject to sales tax); *Ward v. Clayton Comm'r. of Revenue*, 5 N.C. App. 53, 60, 167 S.E. 2d 809 (1969) *aff'd* 172 S.E.2d 531 (taxpayer has the burden of proving deductions); N.J.S.A. §§ 54:32B-12(b)(all sales presumed taxable), 54A:9-9(e) (taxpayer has burden of proof with certain exceptions); Iowa Code § 421.60(6) (Code Supp. 1995) (taxpayer has the burden of proof); *Patterson v. Heitkamp*, 442 N.W.2d 219 (N.D. 1989) (taxpayer has burden of proof); *Appeal of Net Realty Holding Trust*, 128 N.H 795 (1986) (taxpayer has the burden of proof). The *amici* States are aware

instant case is an income tax, the law is generally the same with regard to other state revenue sources, such as sales, gross receipts and excise taxes. *See*, NMSA § 7-9-5 (receipts from engaging in business in New Mexico presumed taxable). Rule of Evidence 301 provides that the ultimate burden of persuasion "remains throughout the trial upon the party on whom it was originally cast." Rule 302 provides that the effect of any presumption arising under state law is to be determined by state law.

Acknowledging that other circuits had reached the "opposite conclusion," 83 F.3d at 1045, the court ruled that the taxing authority had the burden of proof, notwithstanding that non-bankruptcy law puts the burden of proving deductions on the taxpayer. Since there is a direct conflict between the Ninth Circuit and the Fourth, *In re Landbank Equity Corp.*, 973 F.2d 265 (4th Cir. 1992), there is a conflict of cases in the lower courts,[3] and the result would impair state tax collections and

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of no states which require the government to disprove deductions.

[3] The Ninth Circuit construed cases from other circuits and determined that a majority of circuits had concluded that the burden of proof in bankruptcy was with the taxing authority. 83 F.3d at 1045. The Fourth Circuit construed other circuit caselaw and concluded that a majority of the circuits had ruled that the burden of proof in tax cases in bankruptcy court rested with the party objecting to the proof of claim. *In re Landbank Equity Corp.*, 973 F.2d 265, 271 (4th Cir. 1992). The opinion below is also in direct conflict with an Eighth Circuit case involving a bad debt deduction. *In re Uneco*, 532 F.2d 1204, 1207 (8th Cir. 1976). Although a majority of bankruptcy courts are probably in agreement with the Ninth Circuit, *see In re Wilhelm*, 173 B.R. 398 (Bankr. E.D. Wis 1994), the view of the courts on appeal would appear to be mixed. *See In re Ford*, 194 B.R. 583 (S.D. Ohio 1995) (reversing a bankruptcy court which placed the burden of proof on the IRS, and attempting to harmonize the cases on the basis of whether an assessment

transform the bankruptcy courts into the preferred forum for state and federal taxpayers to obtain a favorable determination of tax disputes,[4] the Court should grant certiorari.

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH THE UNDERLYING PRINCIPLES OF *BUTNER V. UNITED STATES*, 440 U.S. 48 (1979) AND 28 U.S.C. § 1652 AND WITH CONGRESS' GRANTING STATUTORY PRIORITY TO TAX CLAIMS

The decision below conflicts with the longstanding principle that non-bankruptcy law governs the rights of creditors. There is no uniform rule regarding burdens of proof in bankruptcy, either statutorily or as a matter of practice, nor should there be. The so-called uniform rule created by the court below would apply only in tax cases and is created by an acknowledged desire to dilute the statutory priority of taxes in the bankruptcy courts.

As this Court has noted time and time again, burdens of proof are part of the substantive law of the state. *E.g.*, *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Palmer v.*

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was issued prior to the bankruptcy petition's being filed). Because the petition for a writ of certiorari fully demonstrates the existence of a circuit court conflict, this brief will not further address that reason for granting the writ.

[4] There is nothing preventing a debtor from filing a bankruptcy petition for no other reason than to obtain a favorable forum to litigate a tax problem. Code § 1307 (b) provides the a Chapter 13 debtor the absolute, non-waiveable, right to dismiss a bankruptcy petition, which the debtor could do subsequent to litigating his tax dispute.

Hoffman, 318 U.S. 109 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). Consistent with those cases, this Court has ruled that when a federal claim is tried in state court, the state court must apply the federal law burden of proof, noting it "was a part of the very substance of his claim and cannot be considered a mere incident of procedure." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49 (1942). *See also, Director, OWCP v. Greenwich Collieries*, 510 U.S. ___, 114 S.Ct. 2251, 2254 (1994).

A basic background principle in the bankruptcy courts was succinctly stated in *Butner v. United States*, 440 U.S. 48, 55 (1979): "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." The Court noted that the "basic rule" in bankruptcy proceedings "is that state law governs." *Id.* at 57. "What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling federal law, is to be determined by reference to state law." *Vanston Bondholders Protective Comm. v. Green, et. al.*, 329 U.S. 156, 161 (1947). *See generally*, Hill, "Erie Doctrine in Bankruptcy," 66 Harv. L. Rev. 1013 (1953) (cited with approval in *Butner*, 440 U.S. at 52 n.2).

Whether a liability exists is often determined by which party had the burden of establishing certain claims or defenses, which is why that burden is considered "a part of the very substance of [the] claim." *Garrett*, 440 U.S. at 55. Altering non-bankruptcy burdens of proof will often create situations where, as the case below exemplifies, a debtor can avoid even non-dischargeable liabilities altogether by shifting to the creditor the burden of proving issues which the debtor bore outside of

bankruptcy. Debtors like Mr. Macfarlane, therefore, receive "a windfall merely by reason of the happenstance of bankruptcy." *Lewis v. Manufacturers National Bank*, 364 U.S. 603, 609 (1961). As was concisely stated by one bankruptcy court: "To rule [in favor of the taxpayer] would permit a tax litigant to shift the burden of proof to the [taxing authority] by filing bankruptcy." *In re Cobb*, 135 B.R. 640, 641 (Bankr. D. Neb. 1992).

The foundation upon which the court's opinion below is built is a "broad rule that taxing authorities are to be treated the same as other claimants *and must therefore bear the ultimate burden of proving their claims in bankruptcy*." 83 F.3d at 1045 (emphasis added). The problem here is that there is no "broad rule" that all claimants "bear the ultimate burden of proving their claims in bankruptcy." In short, the foundation of the court's opinion is constructed on a sinkhole.[5] Although it is *generally* true that claimants--as creditors and therefore the functional equivalent of plaintiffs under non-bankruptcy law--usually bear the burden of proof in bankruptcy as they would outside of bankruptcy, in a variety of circumstances courts have had little difficulty ruling that where non-bankruptcy law places the burden of proof on the debtor, the debtor retains the burden of proof even in a claim objection proceeding. *In re Unioil*, 962 F.2d 988, 994 (10th Cir. 1992) (since party seeking to prove an accord and satisfaction has the burden of proof under Colorado law, the debtor had the burden of proving an accord and satisfaction in a claim objection proceeding); *In re Farris*,

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[5] The court below stated that the "logic of that rule is compelling to us, and accordingly, we hold that the taxing authority has the ultimate burden of proof in the bankruptcy forum." In the absence of such a "broad rule" that creditors "bear the ultimate burden of proving their claims in bankruptcy," the opinion loses all logic, becomes rhetorically un-glued, and falls apart.

194 B.R. 931 (Bankr. E.D. Pa. 1996) (debtor had the same burden of proving likely Truth in Lending Act violation under non-bankruptcy federal law as any other party raising this defense); *In re El Paso Refining, Inc.*, 192 B.R. 144 (Bankr. W.D. Tex. 1996) (in claim objection proceeding in which debtor was a guarantor of a debt, court adopted non-bankruptcy caselaw and ruled that the debtor had the burden of proving that the debt between the creditor and the primary obligor had been satisfied); *In re Brummer*, 147 B.R. 552 (Bankr. D. Mont. 1992) (debtor had burden of proving debt was usurious under Montana law); *In re Biglari Import Export, Inc.*, 130 B.R. 43 (Bankr. W.D. Tex. 1991) (in claim objection proceeding, where creditor had seized collateral prior to the petition being filed, debtor had the burden of proving that the creditor did not exercise reasonable care with regard to repossessed collateral since Texas law put burden of proving this issue on the debtor); *In re Wills*, 126 B.R. 489, 497 (Bankr. E.D. Va. 1991) (summary judgment entered for creditor in claim objection proceeding because debtor had the burden of proving by clear and convincing evidence under Virginia law that contractual debt could be avoided on grounds of incapacity of the debtor at the time of signing the contract); *In re Woehr*, 121 B.R. 743 (N.D. Tex. 1990) (debtor had burden of proving debt usurious under Texas law); *In re Hood*, 95 B.R. 696, 702 (Bankr. W.D Mo. 1989) (debtor had the burden under Missouri law of proving that contract was entered into under duress); *In re Borum*, 60 B.R. 516 (Bankr. E.D. Ark. 1986) (debtor had the burden of proving usury under Arkansas law). The above decisions were not wrongly decided, nor were the cases with which the court below disagreed.

The real driving force of the opinion below, as well as the opinions upon which it relies, is the concept that since tax liabilities receive certain priorities in bankruptcy court, the courts should make it more difficult to establish those liabilities

than under applicable non-bankruptcy law. The court explained at 83 F.3d 1045: "Since tax claims already receive a statutory priority over other claims, relieving the Board of its burden of proof would be granting the Board a double benefit . . . ." This reasoning is faulty. The court missed the point, when it discusses "relieving the Board of *its* burden of proof," that said burden of proof is one which the courts created. By fashioning its result as denying a "double benefit" or refusing to "relieve" the taxing authority of "*its* burden of proof," the court avoids the more accurate characterization of this ruling: creating equitable impediments for a certain class of creditors based upon the notion that Congress has given them too much.

This Court recently reminded the lower courts that this type of reasoning amounted to an unwarranted invasion by the courts into the legislative function. *U.S. v. Noland*, 116 S.Ct. 1524, 1527-28 (1996). The inappropriate use of so-called equitable principles to override legislatively created rights is even more obvious in this proceeding than in *Noland*. There is simply no basis in law or logic for courts to eliminate one benefit which the law provides to a creditor because Congress has also provided the creditor with a different benefit. The effect of the opinion below is not merely to deny California *one* of its benefits; by making it more difficult to establish the liability, the court has effectively eviscerated any benefit which Congress provided to California with respect to that liability.

The opinion below strikes at the heart of tax administration. The basis of taxation in this country, both at the state and federal level, is voluntary compliance, which involves requiring the taxpayer to accurately and honestly report income or revenues and to maintain and retain records substantiating his position in the event of any contest of the tax liability. Taxing authorities are concerned with the widely-held belief that the treatment accorded to taxes in the Bankruptcy Code is

particularly favorable. In state-court receivership proceedings, state and federal taxes are not paid eighth as they are under the bankruptcy code, Code § 507(a)(8), they are generally paid first. *N.M. College of Agric. & Mechanic Arts v. Academy of Aviation, Inc.*, 83 N.M. 86, 488 P.2d 343 (1971). Taxes can be, and indeed often are, discharged under the bankruptcy code unless they fall within a recognized exception. *See* Code §§ 523(a)(1) (providing an exception to discharge for some tax liabilities), 727(b) (providing that a chapter 7 discharges all debts not within a § 523 exception) and 1328(a) (providing no exception to discharge for tax liabilities; tax liabilities completely dischargeable in chapter 13).[6] One reason Congress has given a higher statutory priority to taxes than, for instance, debts owed to trade creditors, is that taxing authorities cannot choose to whom they extend credit and to whom the government extends services, let alone vary interest rates based upon the risk of default or the quality of the collateral. And unlike other involuntary creditors, such as tort claimants, there is seldom any insurance policy to which the government can resort to collect the involuntarily incurred debt. The reason for giving taxes some special protections in bankruptcy is clearly a reasoned judgment of Congress, and it should be respected. Certainly, nothing in the bankruptcy code gives any foundation to the court's conclusion that tax liabilities are to be given less favorable treatment when the liability is disputed by the debtor.

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[6] Although Code § 1322(a)(2) requires that certain "priority" taxes (*e.g.*, trust fund taxes or recently incurred income taxes) must be paid in full over time without interest, reported cases to date have held that a confirmed plan may nevertheless eliminate even those taxes without any payment if a plan which purports to do so is confirmed or the taxing authority misses a proof of claim deadline. *See In re Tomlan*, 102 B.R. 790 (E.D. Wash. 1989), *aff'd* 907 F.2d 114 (9th Cir. 1990) (collecting cases). *See also, In re Lee*, 184 B.R. 257 (W.D. Va. 1995).

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE OPINION BELOW COULD WREAK HAVOC ON STATE AND FEDERAL TAX ADMINISTRATION AND PROMOTE FORUM SHOPPING IN TAX CASES

Cases frequently arise in bankruptcy court where a pre-petition audit discovers unreported income or receipts. Often the taxpayer then claims that, even though the revenue was understated, the taxpayer is entitled to a deduction which the auditor did not recognize. The taxpayer then files bankruptcy. The taxpayer makes thinly-substantiated statements as to its expenses or as to the nature of its sales activity, and asserts that the taxing authority has to disprove these assertions. Disproving a deduction is nearly impossible, unless the taxing authority discovers all of the financial records of the taxpayer and then spends hundreds of hours reconstructing them. In a non-bankruptcy tax proceeding, taxpayers' assertions of fact that are not backed by documentation are given little weight. In bankruptcy court, however, assertions may be enough if the decision below stands. The result is that the Congressional protections given to tax liabilities in bankruptcy court are rendered illusory whenever there is any dispute as to the amount of those liabilities.

If Mr. Macfarlane had chosen to exercise his administrative remedies under California law prior to filing bankruptcy, he would, of course, have been subject to the California standards of proof. Whatever resulted from that proceeding would be binding upon the bankruptcy court. Code § 505(a)(2)(A). *See City Vending of Muskogee v. Oklahoma State Tax Commission*, 898 F.2d 122 (10th Cir. 1990). The resulting liability would be subject to the prioritization and dischargeability provisions of bankruptcy code. The opinion below, if upheld, will create a

positive incentive to file bankruptcy instead of exercising one's administrative remedies under substantive tax law, not because of the bankruptcy law's treatment of that liability but because the bankruptcy court will provide a more favorable forum for the taxpayer to litigate with the government as to the extent of that liability. This cannot be what Congress intended when it enacted the innocuous phrase "the court may determine the amount . . of any tax" in Code § 505(a)(1). Indeed, the relationship between Code § 505(a)(1) (court may determine tax liability) and § 505(a)(2)(A) (court may not determine tax liability if the tax was contested in a judicial or administrative proceeding prior to bankruptcy) would lead to the ordinary conclusion that Congress intended that there should be no difference in the analysis or the outcome when taxes are litigated in bankruptcy.

Moreover, it is doubtful that Congress intended the anomalous situation in which the very same claim adjudication proceeding would be subject to different burdens of proof depending upon whether the bankruptcy court abstained from hearing the proceeding and deferred to a state adjudication, which the law permits in some circumstances and requires in other circumstances. *See* 28 U.S.C. § 1334(c). Under the doctrine enunciated by the court below, a debtor could oppose an abstention motion on the basis that the debtor is more likely to lose in a state proceeding! Such a rationale, while absurd, seems to be dictated by the court's decision based upon the purported "policy considerations that underlie the bankruptcy code," 83 F.3d at 1045.

The ruling that a court should interpret federal law as creating impediments to state tax law is directly contrary to this Court's precedent. In *National Private Truck Council, Inc. v. Oklahoma Tax Commission, et. al*, 115 S.Ct. 2351 (1995), the Court noted that federal laws must be construed against "the

background presumption that federal law generally will not interfere with administration of state taxes . . . ." *Id.*, at 2355. The Court noted that "Congress and [the Supreme Court] repeatedly have shown an aversion to federal interference with state tax administration." *Id.*, at 2354. In the bankruptcy context, this Court has referred to 28 U.S.C. § 960, although not directly applicable in that particular proceeding, as indicating "a Congressional purpose to facilitate--not to obstruct--enforcement of state laws." *Cal Bd. of Equalization v. Sierra Summit*, 490 U.S. 844, 852-53 (1989). In *Sierra Summit*, the Court reversed the Ninth Circuit which ruled that bankruptcy sales were not subject to state sales tax. The court of appeals had ruled that since 28 U.S.C. § 960 did not specifically make the sales subject to tax, federal bankruptcy principles of equity required that they not be taxed. The Supreme Court ruled that the court of appeals erred in ruling that the existence of one statute benefiting state taxes indicated that all other legal benefits in bankruptcy court were implicitly eliminated. The Court concluded that "[i]f Congress wished to declare otherwise, its intent would have to be 'clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'" *Id.*, at 854. *Compare Macfarlane*, 83 F.3d at 1045 ("In the absence of statutory directive, we consider it appropriate to turn to policy considerations that underlie the bankruptcy code.") *with Landbank*, 973 F.2d at 271 (The bankruptcy court's role as a court of equity "does not confer on the court unlimited authority to ignore plain statutory requirements and to alter the substantive rights of the parties.").

III. CALIFORNIA CORRECTLY PERCEIVED THAT THE NINTH CIRCUIT'S STATEMENTS REGARDING SUMMARY JUDGMENT DID

NOT CREATE A SEPARATE ISSUE
RIPE FOR CERTIORARI REVIEW

After first stating that it agreed with the debtor that this was not a summary judgment case, and after ruling on the burden of proof issue, the court stated that even assuming that the case was tried on summary judgment that the debtor should prevail because the Board did not present sufficient evidence to meet its burden of proof of responding to the summary judgment motion. If a trial court erroneously assumes that the ultimate burden of proof is on the non-moving party, and grants summary judgment for the movant, this is grounds for reversal. *Calderone v. U.S.*, 799 U.S. 254, 258-59 (6th Cir. 1986) (reversing a summary judgment against the IRS entered on the erroneous belief that the IRS had the burden of proof). *See also, A.C. Aukerman V. R.L. Chaides Construction*, 960 F.2d 1020, 1039 (Fed. Cir. 1992). It is substantially more difficult to acquire summary judgment if the moving party has the ultimate burden of persuasion at trial. *See Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1193-96 (5th Cir. 1986). *See also Data Gen. v. Grumman Sys. Support*, 36 F.3d 1147, 1159 (1st. Cir. 1994); *Elkins v. Richardson-Merrell*, 8 F.3d 1068, 1071 (6th Cir. 1993).

The difficulty of acquiring summary judgment when the moving party has the ultimate burden of persuasion is that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of the determination." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). By ruling on the substantive evidentiary burden first, the court below was following the guidance of *Anderson*. However, because the court below looked through the wrong prism, remand is necessary to give the court an opportunity to reconsider its ruling. In any event, as the court

below recognized, this is not a summary judgment case, and any tangential issues respecting the summary judgment procedures on remand are more appropriately to be construed by the court below.

CONCLUSION

For all of the foregoing reasons, amici States respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

THOMAS S. UDALL
Attorney General of New Mexico

FRANK D. KATZ
(Counsel of Record)
DONALD F. HARRIS
Special Ass't Attorneys General
New Mexico Taxation and Revenue Dept
P.O. Box 630
Santa Fe, New Mexico 87502
505-827-0731